



July 22, 2004

**BY FEDEX & ECFS**

Mr. Edmond Thomas  
Chief  
Office of Engineering and Technology  
Federal Communications Commission  
445 12<sup>th</sup> St., SW  
Washington, DC 20554

**Re: In the Matter of New Part 4 of the Commission's Rules Concerning  
Disruptions of Communications.**

**ET Docket No. 04-35**

Mr. Thomas:

Alcatel hereby submits this written ex parte presentation, pursuant to Section 1.1206 of the Commissions Rules<sup>1</sup> and Paragraph 62 of the above-entitled Notice of Proposed Rulemaking,<sup>2</sup> to express its opposition to several proposals in the NPRM. Specifically, Alcatel requests the Commission heed the warning of the Department of Homeland Security<sup>3</sup> and many other commenters and maintain confidentiality of network outage reports, reject the proposal in Paragraph 31 of the NPRM to require entities other than the service provider to comply with network outage reporting requirements, and to eliminate the "Name and Type of Equipment that Failed" field on the Proposed Electronic Filing Template included in Appendix B of the NPRM. Alcatel fully appreciates the Commission's motivation to enhance the network outage reporting requirements and increase communications network security and reliability. However, the NPRM includes several provisions that may actually reduce the effectiveness and accuracy of this reporting requirement.

Alcatel is a global communications equipment provider with 60,000 employees and operations in 130 countries. Alcatel offers equipment and solutions to wireline service providers, wireless carriers, satellite operators, and private enterprises. This

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<sup>1</sup> 47 C.F.R. §1.1206.

<sup>2</sup> *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, FCC 04-30, released February 23, 2004, summary published at 69 Fed. Reg. 15761 (March 26, 2004). ("NPRM").

<sup>3</sup> See, *Comments of the Department of Homeland Security, Reply Comments of the Department of Homeland Security*.

broad range of Alcatel's customers includes many of the new categories of service providers this NPRM proposes to include in the network outage reporting requirement, including wireline,<sup>4</sup> wireless,<sup>5</sup> cable circuit-switched telephony,<sup>6</sup> and satellite communications.<sup>7</sup>

## **I. Network Outage Reports Should Remain Confidential**

Alcatel agrees with comments filed in this proceeding that stress network outage reports should receive confidential treatment. The Comments of the Department of Homeland Security, with its national and homeland security functions, should be determinative in this matter. The position of DHS - that outage data that includes detailed cause and impact information that, in the hands of hostile actors, could be employed to target and attack the nation's critical communications infrastructure<sup>8</sup> - is compelling and persuasive. Additionally, numerous other commenters, including several service providers and trade associations, agree with and fully support the position of DHS on the confidentiality issue.<sup>9</sup>

## **II. Entities Other Than the Service Provider Should Not be Required to File Outage Reports.**

The Commission should not adopt its proposal in Paragraph 31 of the NPRM and proposed §§ 4.3(a), 4.3(b), 4.3(d), 4.3(e), and 4.3(f) that compel affiliated and unaffiliated entities that "maintain or provide" communications systems comply with any disruption reporting requirements adopted in this proceeding. Such a requirement is a departure from Commission precedent, is vague and confusing, raises statutory issues, would possibly degrade the accuracy of the outage reporting requirement, and would compound the resources dedicated to administrative tasks during a network outage.

First, communications licensees are solely and ultimately responsible for statutory and license compliance, not the subcontractors or vendors of the licensee. Commission precedence on the liability and responsibility of licensees is clear and extensive.<sup>10</sup> Essentially, this is a principal/agency legal scenario - the principal maintains vicarious liability for the actions of the agent and is ultimately responsible to third parties under common law contracts and tort liability. The Commission recognized a similar relationship in the Secondary Markets Order<sup>11</sup> and held that the licensee, not the licensee, is ultimately responsible to the Commission for complying with statutory and licensee

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<sup>4</sup> Proposed §4.3(f).

<sup>5</sup> Proposed §4.3(b).

<sup>6</sup> Proposed §4.3(a).

<sup>7</sup> Proposed §4.3(d).

<sup>8</sup> Reply Comments of the Department of Homeland Security, at 3.

<sup>9</sup> *Id.*, at fn. 6.

<sup>10</sup> See, *Comments of Ericsson*, at 2-5. See Also, *Reply Comments of Nokia, Inc.*

<sup>11</sup> *Report and Order and Further Notice of Proposed Rulemaking, Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket 00-230, 18 FCC Red 20604 (rel. Oct. 6, 2003).

duties even if day-to-day operations pursuant to the license had been delegated to the lessee. Alcatel agrees with the Comments of the Staff of the Kansas Corporation Commission that outsourcing by the licensee to vendors is a contractual issue, and the reporting requirements should remain with the certified service provider.<sup>12</sup>

Second, such a requirement may be difficult to enforce. What does “maintain or provide” actually mean to the parties? What level of interaction would a vendor need to possess with the licensee’s operations to reach the level of “maintain or provide?” Would the other party have to maintain a position of actually offering the service to end users; and, if so, would this necessitate a transfer of control proceeding? This requirement also fails to recognize that service providers often have multiple vendors providing different services throughout their network or even other service providers from which it leases capacity or networks. In such a scenario, which of the other service providers or vendors, in addition to the licensee, would be responsible for filing reports?

Third, the Commission lacks an appropriate level of statutory authority over the non-licensee vendors to effectively enforce such a requirement. Licensees face monetary fines, license revocation, and other liabilities under both the terms of the license and the enforcement power of the Communications Act, whereas licensee liability is nonexistent for non-licensed entities and statutory authority may be questionable. Alcatel strongly agrees with footnote 11 of Ericsson’s Comments, which illustrates the statutory issues the Commission would have to address in enforcing its outage reporting requirement to an entity not licensed by the Commission or controlled by the licensee.

Fourth, expanding the outage reporting requirement beyond the service provider may result in conflicting reports that degrade the accuracy of information provided to the Commission. A network outage may be caused by several factors, including poor management, failure of systems, malfunctioning equipment, force majeure, etc. The relationship between the service provider and its vendors is governed by contract, and liability for a network outage or equipment failure will most likely be resolved by litigation. In such an environment, the parties will have an incentive and duty to file reports that preserve their respective positions, especially since a representation to the Commission concerning the event would most likely be admissible in a court proceeding between the parties. The Commission may jeopardize the accuracy of the network outage reporting system by inadvertently creating a forum to resolve disputes and preserve legal positions among several conflicting parties to the outage.

Fifth, such a requirement would compound the risk associated with developing and bringing to market next generation equipment and services. Vendor equipment, particularly first generation equipment, goes through several rounds of testing by the service provider customer before integration and deployment. However, the testing procedure for new equipment does not enjoy the benefit of previous rounds in a testing environment. The potential for increased liabilities on vendors, as suggested by the Commission, would compound the risk associated with next generation product development and could negatively impact deployment.

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<sup>12</sup> See, *Comments of the Staff of the Kansas Corporation Commission*, at 4.

Sixth and finally, the Commission's proposal will compound the resources being dedicated to the administrative task of filing initial and final network outage reports at a time when these resources should be dedicated to restoring service and investigating the cause of the outage.

### **III. The Field Designating Failed Equipment on the Electronic Filing Template Should be Eliminated.**

Alcatel requests that any electronic filing template for network outage reports, such as that proposed in Appendix B of the NPRM, not include a field entitled "Name and Type of Equipment that Failed" or similar designation. Such a field is superfluous, creates a forum for disputes between service providers and vendors, and could possibly degrade the accuracy of the information received by the Commission. A broader field for explaining the cause of the network outage, such as that included on page 42 of the Appendix, is sufficient and will provide opportunity for the reporting entity to fully explain its view as to the role any individual equipment contributed to the failure.

Equipment shipped to service providers by vendors, with limited exceptions, becomes the property of the service provider and is operated by the provider from receipt. The service provider installs the equipment, integrates it with its network, and operates it on a going forward basis. A network outage could be caused by the equipment itself, or faulty installation, integration, or operation by the service provider. Isolating the equipment is a possibility, but only after an exhaustive investigation by all parties.

Further, such a field could degrade the accuracy of the information being provided by the reporting entity. The delivery of equipment from vendor to service provider is governed by contract that includes penalties for nonperformance. The reporting entity, or entities, will have an obligation to protect their legal interests, particularly since this report is being filed with a government agency and the report will be admissible in potential litigation between the service provider and the equipment vendor. The reporting entity will have a duty to preserve its position in litigation and may name equipment that may not ultimately be determined to be the cause of the outage.

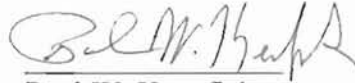
Finally, populating this field with the name of a vendor's equipment could result in irreparable harm to its business reputation. The Commission proposes a very aggressive time frame for reporting outages and completing the proposed template. Isolating the cause of network outages is a complex task that may initially result in inaccuracies. If these reports are publicly available and the reporting entity discloses the name of a vendor, this could result in significant reputational harm to the vendor, regardless of whether it is exonerated at a later date.

We appreciate the Commission's efforts in furthering its mandate to protect the public interest and contribute to homeland security. Seeking comprehensive and accurate

network outage reports is a critical element in fulfilling these obligations, and Alcatel supports the Commission's efforts. By maintaining the confidentiality of these reports, eliminating the proposed requirement that entities other than the licensee or service provider file these reports, and relying on a detailed description of the outage cause rather than specific equipment, the Commission will enhance the accuracy and effectiveness of this system.

Respectfully Submitted,

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